RECORD, CASE No. 14,874.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1400.

OSCAR RICE, PLAINTIFF IN ERROR,

vs.

JANE SANGER, ADMINISTRATRIX.

IN ERROR TO THE SUPREME COURT OF THE STATE OF Kansas.

FILED OCTOBER 5, 1891.

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INDEX.

	Original.	Print.
Caption	1	1
Amendment to petition in error	2	1
Petition in error	3	2
Cross-petition in error	4	3
Exhibit A—Case made in district court	5	4
Petition	5	4
Præcipe for summons	6	5
Note as to issuance of summons	6	5
Answer of I. S. Sanger	6	5
Answer of W. P. Patterson	6	5
Reply to Sanger's answer	7	6
Order for judgment setting aside same, granting new trial, and continuance	7	6
Order making Oscar Rice party plaintiff, &c.	7	7
Evidence for plaintiff	8	7
Affidavit of Harry S. Schaeffer	8	7
Evidence for defendants	9	8
Tax deed from Bourbon county to J. F. Cottrell, September 16, 1881	9	8

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	Original.	Print.
Certificate of sale No. 1240, September 15, 1881, &c.	10	10
Testimony of E. J. Hall	11	11
Dr. I. S. Sanger	13	13
Dr. I. S. Sanger (recalled)	15	16
Exhibit A—Tax-roll	17	17
Findings of fact	18	18
Conclusions of law	19	19
Judgment	19	19
Motion to modify judgment, &c.	19	20
Order overruling motion to modify judgment	20	20
Motion for new trial	20	20
Order overruling motion for new trial, &c.	21	21
Judge's certificate to case made	21	21
Clerk's certificate	22	21
Order taking cause under advisement	23	22
Judgment	24	23
Syllabus	26	23
Opinion	29	26
Order overruling motion for rehearing	38	31
Petition for writ of error	39	31
Allowance of writ of error	40	32
Bond	41	32
Writ of error	43	33
Citation and proof of service of same	44	34
Clerk's certificate	45	34
Stipulation for addition to record	46	35
Motion for rehearing	47	35

1 In the Supreme Court of the State of Kansas.

JANE SANGER, Administratrix of the Estate of I. S. Sanger, Deceased, Plaintiff in Error,
vs.
DAVID R. RICE and OSCAR RICE, Defendants in Error. } No. 5250.

Be it remembered that on the 14th day of May, 1888, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error, with waiver of summons endorsed thereon, and with a case made attached thereto as a part thereof; and on the 19th day of January, 1889, a cross-petition in error, with waiver of summons endorsed thereon, and on the 9th day of May, 1889, an amended petition in error, all of which are in the words and figures as follows, to wit:

2 In the Supreme Court of the State of Kansas.

JANE SANGER, Individually and as Administratrix of the Estate of I. S. Sanger, Deceased, Plaintiff in Error,
vs.
DAVID P. RICE and OSCAR RICE, Defendants in Error.

Amendment to Petition in Error.

Now comes the said Jane Sanger above named, and who prosecutes this action in her own name and right, individually and as administratrix of the estate of I. S. Sanger, deceased, late plaintiff in error herein, and says—

That since the filing of the original petition in error herein, which said petition and the allegations, facts, matters, and things therein contained and set forth she hereby adopts and makes her own, the said I. S. Sanger, late plaintiff in error herein, departed this life intestate, leaving surviving him as his sole heir-at-law, the said Jane Sanger, above named, who is his widow.

That since then she has been and still is the duly qualified and acting administratrix of the estate of I. S. Sanger, deceased, thereunto lawfully appointed by the probate court of Bourbon county, State of Kansas, and that the said action, as entitled in said original petition, has been duly revived by the order of this court in the name of the said Jane Sanger, individually and as such administratrix.

That she now files this as an amendment to said original petition in error, showing her interest herein, and prays relief as demanded in said petition in error.

J. D. McCLEVERTY,
Attorney for Plaintiff in Error.

Filed May 9th, 1889.

C. J. BROWN,
Clerk Supreme Court.

3 In the Supreme Court of the State of Kansas.

I. S. SANGER, Plaintiff in Error,
vs.
DAVID R. RICE and OSCAR RICE, by Leave of Court, Defendant- in Error.

Petition in Error.

The plaintiff in error, I. S. Sanger, above named, says—

That in an action lately pending in the district court within and for Bourbon county, State of Kansas, at the regular December, 1887, term thereof, wherein defendants in error were plaintiffs and plaintiff in error *et al.* were defendants, defendants in error did, on the 27th day of February, 1888, by the consideration of said court, recover a judgment against this plaintiff. A full and true case made, containing and showing said judgment and all of the pleadings, record, and proceedings in said action, is hereto attached, marked "A," and made part hereof. Plaintiff in error avers that there is error in said judgment, record, and proceedings, in this, to wit:

1st. That there is error in the assessment of the amount of recovery in favor of plaintiff in error, in that the amount is too small.

Second. That the findings and judgment and each and every of them are contrary to law.

3rd. That the findings and judgment and each and every of them are not sustained by sufficient evidence.

4th. For error of law occurring at the trial and excepted to by plaintiff in error at the time.

5th. That the said findings and judgment and each and every of them should have been in favor of plaintiff in error.

6th. In denying the motion of plaintiff in error to set aside said judgment and for a new trial of said action.

Wherefore plaintiff in error prays the consideration of the court in the premises that the said judgment may be reversed, he restored to all things lost thereby, and for costs.

J. D. McCLEVERTY,
Att'y for Pl'ff in Error.

Service of summons in error herein is hereby waived this 8th day of May, 1888.

WARE, BIDDLE & CORY,
Att'ys for Def'ts in Error.

Filed May 14, 1888.

C. J. BROWN,
Clerk Supreme Court.

4 In the Supreme Court of the State of Kansas.

I. S. SANGER, Plaintiff in Error,
vs.
DAVID R. RICE and OSCAR RICE, by Leave of Court, Defendant-in Error.

Cross-Petition in Error of Oscar Rice.

Now comes said Oscar Rice, defendant in error, and says for his cross-petition in error that in the judgment, findings, and decrees of the district court of Bourbon county, Kansas, in the action described in the plaintiff's petition in error, the court erred in assessing the amount of taxes, interests, and costs for the years from 1873 to 1885.

1. That the sum of $871.78, as found in the third conclusion of law and as adjudged and decreed that the plaintiff should pay in said action, before said Oscar Rice was entitled to the possession of said premises.

2. That to that extent said conclusions of law and judgment were erroneous.

3. That the said assessment of $871.78 was too high.

4. That the court erred in not sustaining the motion of said Oscar Rice to modify said judgment.

5. That said finding, conclusion of law, and judgment, as described in No. 1 above, is not sustained by the evidence and is contrary to law; said errors appear in the record attached to the petition in error, to which reference is hereby made.

Wherefore said Oscar Rice prays for a consideration, and that this court may modify said finding, conclusions of law, and decree as the evidence in law may warrant.

WARE, BIDDLE AND CORY,
Att'ys for Oscar Rice.

We, the undersigned, attorney for plaintiff in error, accept service of the within cross-petition in error and waive the issue and service of summons in error this 15th day of January, 1889.

J. D. McCLEVERTY,
Attorney for Plaintiff in Error.

[Endorsed:] I. S. Sanger *vs.* David R. Rice & Oscar Rice. Cross-petition in error. Ware, Biddle & Cory. Filed January 19, 1889. C. J. Brown, clerk supreme court.

5 "A."

RICE
vs.
SANGER.

Case Made.

In the District Court of Bourbon County, State of Kansas.

DAVID R. RICE, Plaintiff,
vs.
I. S. SANGER, W. P. PATTERSON; also GEO. W. MOORE, HENRY C. Dwight, and Frederick R. Foster, Trustees under the Will of William Stanley, Dec's'd, for the Benefit of the Second Ec-le-siastical Society, in the Town of Hartford, Conn.; also the Second Ec-lesiastical Society, in the Town of Hartford, Connecticut, Defendants.

Case Made.

Be it remembered that on the third day of June, 1887, David R. Rice commenced his action in the district court within and for Bourbon county, State of Kansas, against I. S. Sanger *et al.* by filing his petition in said court, which is in words and figures as follows, to wit:

In the District Court of Bourbon County, Kansas.

DAVID R. RICE, Plaintiff,
vs.
I. S. SANGER, W. P. PATTERSON; also GEORGE W. MOORE, HENRY C. Dwight, and Frederick R. Foster, Trustees under the Will of William Stanley, Deceased, for the Benefit of the Second Ec-lesiastical Society, in the Town of Hartford, Conn.; also the Second Ec-lesiastical Society, in the Town of Hartford, Conn., Defendants.

Petition.

"Said plaintiff for cause of action against said defendants say-:

That said The Second Ec-lesiastical Society, in the town of Hartford, Connecticut, is a corporation duly incorporated and organized under the laws of the State of Connecticut, and that said defendants, Geo. W. Moore, Henry C. Dwight, and Frederick R. Foster, are the trustees of said corporation under the will of William Stanley, dec'd.

That the plaintiff is the owner in fee simple of the following-described real estate, situate in Bourbon county, Kansas, to wit: The north half of lot number twelve (12), in block No. one hundred and two (102), in the city of Fort Scott, and is entitled to the
6 possession of the same.

That said defendants unlawfully keep him out of the possession of the same.

Wherefore plaintiff demands judgment that he is the owner in fee simple of said premises, for the possession thereof, and for costs.

WARE, BIDDLE & CORY,
Att'ys for Plaintiff."

To clerk:

Issue summons herein, directed to the sheriff of Bourbon county, returnable according to law, and oblige,

WARE, BIDDLE & CORY,
Att'ys for Plaintiff.

Said petition is endorsed as follows, to wit: "Filed June 3rd, 1887. B. Hudson, clerk."

Security for costs was given by said plaintiff. Summons was duly issued by the clerk pursuant to said precipe, served, and due return made as to the defendants I. S. Sanger and W. P. Patterson. There was no service as to the other defendants.

Afterwards, on the 5th day of July, 1887, defendant I. S. Sanger filed his answer in said suit, which is in words and figures as follows, to wit:

In the District Court of Bourbon County, State of Kansas.

D. R. RICE, Plaintiff,
vs.
I. S. SANGER *et al.*, Defendants. } Answer.

The said I. S. Sanger, for answer herein, says—

That he is the owner in fee and in the possession of the said premises in plaintiff's petition mentioned and described and has been for many years; that the pretended claim of plaintiff is a cloud upon defendants' title, which he continually asserts and refuses to deny.

Wherefore this defendant demands that his title be quieted as against any and all claim of plaintiff of title to said premises and said plaintiff forever enjoined from asserting any claim or title thereto, and for costs.

J. D. McCLEVERTY,
Att'y for Defendant Sanger.

Said answer is endorsed as follows: "Filed July 5, 1887. B. Hudson, clerk."

Also on said 5th day of July defendant W. P. Patterson filed his answer in words and figures as follows, to wit:

In the District Court of Bourbon County, State of Kansas.

D. R. RICE, Plaintiff,
vs.
I. S. SANGER *et al.*, Defendants. } Answer.

The said defendant, W. P. Patterson, for answer herein, says—

That the only interest he has in said premises is as tenant of the said defendant, I. S. Sanger, and makes no other claim thereto.

Wherefore he demands judgment for costs.

J. D. McCLEVERTY,
Att'y for Defendant W. P. Patterson.

7 Said answer is endorsed as follows: "Filed July 5th, 1887. B. Hudson, clerk."

Afterwards, on the 9th day of July, 1887, plaintiff filed his reply in words and figures as follows, to wit:

In the District Court of Bourbon County, Kansas.

DAVID R. RICE, Plaintiff,
vs.
I. S. SANGER *et al.*, Defendants.

Reply to Sanger's Answer.

Now comes plaintiff and, for reply to the answer of said I. S. Sanger, denies each and every allegation in said answer contained.

WARE, BIDDLE AND CORY,
Pl'ff's Att'ys.

Said reply is endorsed as follows: "Filed July 9, 1887. B. Hudson, clerk."

Afterwards, on the 13th day of September, 1887, at the regular September term of said court, 1887, said cause came on for trial before the court, a jury being waived, and the court found in favor of the plaintiff, as fully appears by the journal entry thereof; thereupon the defendant gave notice upon the journal demanding a new trial of said cause, and that said judgment be set aside; which, upon the hearing thereof, was granted and the cause continued, as appears by journal entry as follows:

"Journal of the District Court, Bourbon County, Kansas, September Term, 1887, 13th day of September, 1887.

DAVID R. RICE, Plaintiff,
vs.
I. S. SANGER *et al.*, Defendants.

"This day this cause came on to be heard upon the regular call of the docket. The plaintiff appeared by his attorneys, Messrs. Ware, Biddle & Cory, and the defendants by their attorney, J. D. McCleverty, and the parties hereto, waiving the intervention of a jury, the cause was submitted to the court; and the court, having heard the evidence and the arguments of counsel and being fully advised in the premises, finds upon the issues joined in favor of the plaintiff.

Wherefore it is by the court considered, ordered, and adjudged

that the plaintiff have and recover of and from the defendant- the possession of the property described in the petition filed herein and his costs herein; thereupon the defendants gave this notice upon the journal of their application to set aside the judgment herein and for a new trial hereof; and, it appearing to the court that said motion should be granted, it is by the court considered, ordered, and adjudged that the judgment this day rendered herein be, and the same is hereby, set aside and a new trial hereof is granted and this cause is continued."

Afterwards, upon application of plaintiff, Oscar Rice was substituted as party plaintiff herein, as shown by journal entry as follows:

"Journal of the District Court, Bourbon County, Kansas, De-
8 cember Term, 1887, 11th day of February, 1888.

DAVID R. RICE, Plaintiff,
vs.
I. S. SANGER, Defendant.

"This cause came on to be heard upon the application of Oscar Rice to be made a party plaintiff herein, because he has obtained the plaintiff's title to said property described in the petition since the commencement of this action, and to file an amendment to the petition herein; and, it appearing to the court that since the commencement of this action Oscar Rice has obtained by conveyance the plaintiff's title to said property, it is by the court ordered and adjudged that the said Oscar Rice be, and he is hereby, made a party plaintiff herein, with leave to answer instanter.

Thereupon proper pleadings were filed substituting said Oscar Rice for said David R. Rice as plaintiff herein.

Plaintiff's Evidence.

Afterwards, at the regular December, 1887, term of said court, on the 27th day of February, 1888, said cause came on for hearing upon the regular call of the docket, both parties appearing in person and by attorneys, and the plaintiff, to maintain the issues upon his part, introduced evidence as follows:

Plaintiff offered to prove and the defendant admitted a line of conveyances, showing a perfect title from the Government of the United States down to and including William Schaffer to the property in question, the north half of lot 12, block 102, city of Ft. Scott, Kansas.

Plaintiff also introduced the following affidavit of Harry S. Schaeffer, which, by consent, was admitted as his deposition:

STATE OF MISSOURI, } ss:
Jackson County, }

Be it remembered that on this 7th day of June, 1887, personally appeared Harry S. Schaeffer, who, being duly sworn, deposes and

says that he is a son of William Schaeffer, deceased, who owned in fee simple at the time of his death the north half (½) of lot twelve (12), in block one hundred and two (102), city of Ft. Scott, Kansas.

Said William Schaeffer died intestate at Richmond, Virginia, on December 6th, 1876, and left surviving him as his only heirs-at-law his widow, Margaret R. Schaeffer, and his children, William C. Schaeffer, Celia M. Clark, Harry S. Schaeffer, Birnie S. Brent.

I was acquainted with the financial condition of the estate of said William Schaeffer, deceased, at the time of his death, and know that he died solvent, and that all of his debts have been paid.

HARRY S. SCHAEFFER.

Subscribed and sworn to before me this 7th day of June, 1887.

HAROLD S. KEATING, [L. S.]
Notary Public.

Plaintiff also put in evidence a quitclaim deed from William C. Shaffer and wife, Jennie H.; Birnie S. Brent and husband, Henry C., and Harry S. Schaeffer, single, properly executed, dated Apr. 23rd, 1887, to David R. Rice—consideration, $1—for the north half of lot 12, block 102, city of Ft. Scott, Kansas.

Plaintiff also put in evidence a quitclaim deed from Margaret R. Schaeffer, widow; Delia M. Clark and husband, Frank, properly executed, dated April 23rd, 1887, to David R. Rice; consideration, $1; same description.

9 Plaintiff also introduced a deed from David R. Rice and wife, Belle, to Oscar Rice, dated December 26, 1887, properly executed; consideration, $1.00; same description; said deed being signed and acknowledged by R. P. Rice, as attorney-in-fact for D. R. and Belle Rice.

Thereupon plaintiff rested.

Defendant's Evidence.

Thereupon the defendant, to maintain the issues upon his part, introduced a certain tax deed from Bourbon county to J. F. Cottrell in evidence; to which the plaintiff objected for the reason, as plaintiff claimed, that said deed was void upon its face; said deed was admitted, with other evidence, by the court subject to ultimate decision upon its validity upon the argument of the case, and is as follows:

Know all men by these presents that whereas the following-described real property, viz., north ½ of lot No. twelve (12), in block No. one hundred and two (102), in the city of Ft. Scott, situated in the county of Bourbon and State of Kansas, was subject to taxation for the year A. D. 1873; and

Whereas the taxes assessed upon said real property for the year aforesaid remained due and unpaid at the date of the sale hereinafter mentioned; and

Whereas the treasurer of said county did, on the 21st day of May, 1874, by virtue of the authority in him vested by law, at the sale

begun and publicly held on the first Tuesday of May, A. D. 1874, expose to public sale, at the county-seat of said county, in substantial conformity with all the requisitions of the statute in such cases made and provided, the real property above described, for the payment of the taxes, interest, and costs then due and remaining unpaid upon said property; and

Whereas, at the time and place aforesaid, there being no bidders for said property, said property could not be sold for the amount of taxes and charges thereon, said N. ½ lot 12, block 102, in the city of Ft. Scott, Kansas, was bid off by the county treasurer for the county of Bourbon, and for the sum of forty-one dollars and thirty-four cents, being the whole amount of taxes, interests, and costs then due and remaining unpaid on said property; and

Whereas the said county of Bourbon did, on the 15th day of September, A. D. 1881, duly assign the certificate of the sale of the property as aforesaid and all its right, title, and interest to said property to John F. Cottrell, of the county of Bourbon and State of Kansas, for the sum of one hundred and ninety-two and $\frac{59}{100}$ dollars, in full of taxes, costs, and interest on said property for the year 1873, for Macadam tax only; and

Whereas over three years have elapsed since the date of said sale and the said property has not been redeemed therefrom, as provided by law:

Now, therefore, I, L. B. Welch, the county clerk of the county aforesaid, for and in consideration of the said sum of one hundred and ninety-two dollars and fifty-nine cents, taxes, costs, and interest due on said lands for the years aforesaid, to the treasurer paid as aforesaid, and by virtue of the statute in such cases made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said John F. Cottrell, his heirs and assigns, the real property last hereinbefore described; to have and to hold unto him, the said John F. Cottrell, his heirs and assigns forever, subject, however, to all the right of redemption provided by law.

In witness whereof I, L. B. Welch, the county clerk as aforesaid, have hereunto subscribed my name and affixed the official seal of said county on the 16th day of September, A. D. 1881.

[L. S.] L. B. WELCH,
County Clerk.

STATE OF KANSAS, }
County of Bourbon, } *ss:*

I hereby certify that before me, James M. Stanley, a register of deeds in and for said county, personally appeared the within-named L. B. Welch, county clerk of said county, personally known to be the clerk of said county at the date of the execution of the within conveyance and to be the identical person whose name is affixed to and who executed the within conveyance as clerk of said county, and who acknowledged the execution of the same to be his voluntary act and deed as clerk of said county for the purpose therein expressed.

Witness my hand and official seal this 16th day of September, A. D. 1881.

[L. S.] JAMES M. STANLEY,
Register of Deeds.

Bourbon county to John F. Cottrell. Recorded October 19th, A. D. 1881, at 2½ o'clock p. m.

JAMES M. STANLEY,
Register of Deeds.

Defendant also offered in evidence a certificate of sale of said property to Bourbon county and the assignment of the same by the county clerk of said county to John F. Cottrell; to which plaintiff objected and which was likewise admitted by the court subject to ultimate decision upon the argument of said case. Following is a copy of the said certificate:

Certificate No. 1240.

STATE OF KANSAS, }
Bourbon County, } *ss:*

I, the undersigned, county treasurer of said county, do hereby certify that at a public sale of real property for delinquent taxes held at the office of the county treasurer, at the county-seat of said county, on the 21st day of May, A. D. 1874, the following-described property, situated in said county and State of Kansas, to wit:

Description.	Sec.	T.	R.	No. of acres.	Am't. $ cts.	Lot.	Block.	City.	Am't.
City of Ft. Scott, N. ½.	----	----	----	------	------	12	102	Macadam tax, Ft. Scott.	41 34

was offered for sale at public auction for the taxes and charges thereon then due; and, there being no bidder for said property, it was therefore bid off for said county for the sum of forty-one and $\frac{34}{100}$ dollars, being the full amount of taxes, costs, and charges thereon for the year 1873; and I further certify that Jno. F. Cottrell has paid into the county treasurer of said county for said property the sum of one hundred and ninety-two $\frac{59}{100}$ dollars, a sum equal to the cost of redemption of the same at this time, and said purchaser will be entitled to a deed for said property on the 15th day of September, 1881, unless the same shall have been redeemed, as provided by law.

11 In witness whereof I have hereunto set my hand this 15th day of September, A. D. 1881.

J. H. BROWN,
County Treasurer.

I, L. B. Welch, county clerk of said county, in consideration of the payment of 192.59 dollars into the county treasury of the

above-named county and by virtue of authority in me vested by law, do hereby assign and transfer the above certificate and all the interest of said county in and to said property to the above-named purchaser.

Given under my hand and official seal this 15th day of September, 1881.

L. B. WELCH, [SEAL.]
County Clerk.

Exhibit of above payment:

Am't of tax of 1873	$192	59
Macadam		
Tax only		
Fees		50
	193	09

Tax deed for the within property issued September 16th, 1881, to John F. Cottrell.

L. B. WELCH, *Co. Clerk.*

E. J. HALL, being then sworn as a witness by and on behalf of the defendant, testified as follows:

Q. Do you know this north half of lot 12, block 102, in this city?

A. Yes, sir.

Q. How near it do you live?

A. I live in the middle of the same block.

Q. That would be usually about 75 feet?

A. About 75 feet.

Q. How long have you lived there?

A. I have lived there about 15 years—between 15 and 16 years.

Q. State if at any time you put any building or improvements on that lot for any person, and for whom.

Plaintiff objected because it is immaterial and incompetent. Objection overruled, and plaintiff excepted.

A. I have put buildings on there at different times; twice at least.

Q. Who for? And state the circumstances.

A. The first work that was done on there was about the first year I lived there, 16 years ago; Mr. Cassell had a lease on the lot then.

Q. Pass to the next one that you spoke of.

A. I don't recollect doing much of anything more on it, only when that house moved away; I prepared for the moving, and I don't know that I ever did any more work on the lot, until six years ago, about, I built a coal-house on there for Gittery, in the rear part of the lot.

Q. How long had the Gitterys been in the use and possession of the lot prior to that time?

A. They lived in No. 12. They had been in there some time. I don't know exactly how long; but they wanted to build a coal-house,

and they hadn't room enough on the back of their lot, so they provided for me to put up a coal-house, and when I went to put it up they would tell me where to put it, and said they had arrangements with Dr. Sanger to put it on that lot. I asked did he own it, and she said yes; he had bought it.

12 Q. As a matter of fact, they had made use of that lot for some time prior to that?

A. I think they had made use of some part of it.

Q. And how long did they continue in the use of it?

A. I think three or four years. They were in there when Mr. Moody bought the corner.

Cross-examination by Mr. WARE:

Q. This property here in controversy is the north half of lot 12?

A. Yes, sir.

Q. On the south half of it there was a two-story frame house?

A. And it was there then, owned by Mr. Moody.

Q. The Gitterie family lived in the top of this two-story frame house?

A. Yes, sir.

Q. And you built a coal-house for them? How much of a building was it in value?

A. Why, I think it was some 16 or $17—a rough coal-house; yet it was a solid coal-house, that he could put in his coal and lock it up. He could put in three or four hundred bushels.

Q. What became of it?

A. I forget; I think it was moved away; either Gitteries moved it away or it was taken to some other location. I lost track of where it went to.

Q. When that coal-house was put on the rear of the lot was there any other buildings on the half that the coal-house was on?

A. I think there was something more on it, but not quite as far on it.

Q. What buildings were there?

A. Some out-buildings, chicken-coop, and something of that kind.

Q. Who put those on?

A. I don't know. They were just on the edge of the north half of the lot.

Q. Probably run over or across the line through ignorance of where the line run?

A. I don't know.

Q. Were there any other buildings on the north half of the lot except the coal-house when the coal-house was there?

A. I don't know as there were at that time, but very soon afterwards Mrs. Gitterie put up a good-sized chicken-house in the back of the lot, and had a pony-shed there.

Q. Were they moved finally, with the balance of the coal-house and things?

A. I think when Gitteries went away they disposed of the balance of the things there.

Q. In what condition did that leave the lot?

A. I guess it left it very nearly naked. I never noticed whether it did leave it entirely naked, or very nearly, I should think.

Q. I notice from the abstract that the deed from Cottrell to Dr. Sanger is dated September 20th, 1882. Refreshing your memory from that date, when, with reference to that, was that coal-house put on?

A. Well, I don't remember exactly. I don't think there is anything I could refer to. I think Gitterie paid me for it and I never made any book account of it. I think it was as late as 1881 or 1882. It might have been—it don't seem to me, but it might have been 1883. It must have been along in 1883, certain, I think.

13 Dr. I. S. SANGER, sworn as a witness on behalf of defendant, testified as follows:

Examination by Mr. CLEVERTY:

Q. I believe you are the defendant in this case?

A. Yes, sir.

Q. Calling your attention to the date of this tax deed, September 16th, 1881, you may state what was done by the grantee as to possession of it.

A. I don't understand you.

Q. What was done with reference to taking possession under that tax deed? The tax deed runs to Mr. Cottrell. What was done, if anything, as to the possession and use of that property?

A. Why, it remained right there with Mrs. Gitterie. She wanted to put a hen-coop on it. She was to take care of and look after the property, and she had put a hen-coop on it.

Q. Had she been using it by any arrangement prior to that?

A. I don't know.

Q. How long did she continue in the use of it?

A. As long as she lived there—all the time. Something like six years, I guess.

Q. Who else did you have there as a tenant in any way?

A. Mr. Curns, the stoneman, used it as a yard to cut stone, and Patterson used it for his bulletin boards.

Q. Have you had the continuous possession in the way in which you have explained?

A. Yes, sir.

Q. What money have you expended upon that property yourself, aside from the taxes?

A. Well, the stone sidewalk.

Q. What expenditure was there for that?

A. I guess about $20. It was 12 and ½ cents a foot, six feet wide and 25 feet long—12 and ½ cents a square foot.

Q. Let me ask you whether this arrangement that you made with Mrs. Gitterie was for Mr. Cottrell, immediately after this tax deed had been issued.

A. Yes; after the first tax deed; within a few days afterwards she spoke to me.

Cross-examination by Mr. WARE:

Q. Do you mean to say that you and Mrs. Gitterie had this conversation before you got this property or afterwards?

A. Afterwards.

Q. Who did you get the property from?

A. Bourbon county.

Q. Mr. Cottrell?

A. Yes; Mr. Cottrell.

Q. How long did Mr. Cottrell own it, if you remember, before you got it?

A. Six years, I think.

Q. You don't mean that, Doctor. I means, how long before you got it?

A. Oh, it was last summer I got it from Mr. Cottrell—a year ago.

Q. Did you own it before you got it from Mr. Cottrell, before Mr. Cottrell deedee it to you.

A. Yes, sir.

Q. I don't quite understand you. I am trying to fix the dates. What I am trying to get at is when you first became the owner of the property and how you became the owner—about the dates, as near as you can give it, Doctor.

14 A. I became the owner (sentence unfinished)——

Q. Have you got the deeds with you?

A. No, sir.

Q. Did Mr. Cottrell buy that property and take this tax deed out for you?

A. Yes, sir.

Q. Or did he do it for himself?

A. For me.

Q. He took it out in his name for you? That is what I mean to say.

A. Yes, sir.

Q. Which one of tax deeds?

A. Both of them.

Q. He took out both of them in his name for you?

A. Yes, sir.

Q. Then he was the original purchaser?

A. Yes, sir.

Q. You got it of Mr. Cottrell?

A. Yes, sir.

Q. Now, under which one of the tax deeds did you take possession? There are two tax deeds; tax certificate and tax deeds were taken in Mr. Cottrell's name to lot 12 and the south half of lot 10. You put them in Cottrell's name—the tax certificate and the tax deeds. There are two tax deeds upon this particular piece of property, one of which has been introduced in evidence. Did you take possession under the first or under the second?

A. I think I took possession immediately under the first.

Q. This one here in evidence?

A. Yes, sir.

Q. How much did Mrs. Gitterie pay you?

A. Well, she was to take charge and look after it—merely a nominal something—I forget now.

Q. How much did she pay you?

A. I couldn't know exactly how much she did pay.

Q. Was it — much as $5?

A. Yes, as much as that.

Q. As much as $10?

A. That would depend upon how much she charged. She did some things for me and I did some prescribing for her. I doctored the little girl, and one thing offset the other.

Q. In what year was Mr. Curns in possession there?

A. I presume it was after I had the deeds.

Q. How long was he in, Doctor?

A. He paid me rent twice; it was a number of year- ago; something less than a year—nine months, I believe.

Q. How much did he pay you in all, Doctor?

A. He might have paid me $12.00.

Q. You think it was in 1883?

A. Yes; it was after I owned it.

Q. When did Mrs. Gitterie move out, and when did the coal-house and chicken-coop move away?

A. I think last summer.

Q. How long in were they when she went away?

A. It is a year last summer, or the summer before that.

Q. When were the bulletin boards put up there?

A. Let me see. Time slips away so fast now it is hard to tell. It was 1886, I believe.

15 Q. Were they put up in '86, you think?

A. Yes, sir.

Q. About what time, Doctor?

A. It might have been in 1885; it was in September, and rented until the next March; gave a receipt until the next March.

Q. How much have you received for the bulletin board?

A. About $3. This last payment was $3. I forget what the other was.

Q. The whole of the bulletin boards?

A. Five or six dollars.

Q. Wouldn't it amount to a little the rise of that?

A. I don't remember. I thought it was pretty cheap at that—to get the whole 50 feet, too, that he paid for, including the south half of lot 10. I think that is all they paid; paid me $3 the next March; it was in December; he paid until the next March—last March; and the last time he said he wouldn't pay anything; he didn't know whether I owned it or not. He said he didn't know but Rice owned it; but he has since paid me.

Q. What I want to get at is about how much was paid you altogether on the bulletin-board business?

A. I don't think more than $5; $3 the first time, and this last time, a month or two ago.

Q. That included the whole 50 feet?

A. Yes, sir.

Redirect:

Q. As I understand you, Mr. Cottrell made this purchase for you?
A. Yes, sir.
Q. And as soon as it was made, you made this arrangement with Mrs. Gittrie?
A. Immediately afterwards; yes, sir. She wanted to use it to hand clothes out on, and all that sort of thing.
Q. And since that Mr. Cottrell deed- it to you?
A. Yes, sir.

Defendant hereupon offered in evidence a second tax deed for the purpose of redemption.

Plaintiff objected because it was void upon its face. Objection overruled.

Defendant also offered in evidence deed from J. F. Cottrell to I. S. Sanger, dated July 10th, 1882.

Dr. SANGER recalled in his own behalf:

Q. When was this deed from Cottrell to you in fact delivered? It is dated July 2nd, 1882.
A. It was delivered to me a year ago.
Q. The time that you put it on record was the actual date that you received it?
A. Yes, sir.

Mr. CLEVERTY: It was put on record February, 1887.

It was admitted by both parties that there stood upon the tax-rolls of Bourbon county, Kansas, in the year 1873, an amount which had been assessed by the city of Ft. Scott, in said county, for the purpose of macadamizing the street immediately in front of this lot, which was named by the county treasurer and commonly known as "Macadam tax," and is the said tax for which this sale was made and upon which the said tax deed in evidence herein is based. The general taxes levied in said city for that year were entered along with the State and county taxes, beginning in the front part of the said book, and all of the taxes chargeable against said prop-
16 erty for the year 1873, except the said Macadam taxes, were paid, leaving only unpaid the said Macadam tax upon which said sale is based. Said Macadam tax was entered with other lots separately in the back part of said book, and was in amount $37.40, and which, with 10 per cent. penalty added and costs of sale, as provided by law, amounted to $41.34, for which said sale was made. A copy of tax-roll for said year for all taxes appears on next page, marked "A."

Defendant, for the purpose of showing the payment of subsequent taxes and not for the purpose establishing title, put in evidence a tax deed, dated June 20, 1882, recorded August 26, 1882, for the taxes of 1874, sold September 15th, 1875, and showing the issuance of a tax-sale certificate under an order of compromise made by the

board of county commissioners on the 15th day of September, 1881, fixing the amount to be paid for the tax deed to the said property herein in dispute for the years 1874, 1875, 1876, 1877, 1878, 1879, and 1880, at $97.05, and proved subsequent taxes from the date of said deed as follows: 1881, $9.02; 1882, $13.05; 1883, $13.43; 1884, $18.98; 1885, $12.75; 1886, $31.98.

Defendant also put in evidence a quitclaim deed from John F. Cottrell to the defendant, I. S. Sanger, executed July 10th, 1882, recorded Feb'y 3, 1887, conveying the said north half of lot No. 12, block No. 102, city of Ft. Scott, Kansas.

Defendant rested.
Plaintiff rested.

17 On the first page of the tax-roll for 1873 appears a certificate containing as follows:

STATE OF KANSAS, }
Bourbon County, } *ss:*

It is hereby certified that this book and the contents within compose the original tax-roll of the city of Fort Scott, in the county aforesaid, and the additions thereto adjoining and adjacent, and also the special assessments of McAdam's tax levied by the city council of said city for the year 1873.

* * * * * * *

Witness my hand and official seal this 3rd day of November, 1873.
[SEAL.] JAMES H. BROWN, *Co. Clerk.*

The above is the only reference to the McAdam tax in said tax *in said tax* book, except as shown by the opposite page; said tax book is composed of the following and nothing else:

1st. On fly-leaf the above certificate.
2nd. On pages 1 to 118, inclusive, taxes on lots and additions.
3rd. On pages from 119 to 140, inclusive, the McAdam tax.
4th. On pages from 132 to 140, inclusive, personal property tax.
5th. Balance of pages are blank.

(Here follows tax-roll.)

18 Afterwards, on the 27th day of February, 1888, said cause came on for a second hearing and trial before the court at the regular December, 1887, term thereof; and the court, upon the hearing, found in favor of the plaintiff, as fully appears by journal entry thereof, which is as follows:

"Journal of the District Court, Bourbon County, Kansas, December Term, 1887, 27th day of February, 1888.

DAVID R. RICE and OSCAR RICE, by Leave of Court, Plaintiff-,
vs.
I. S. SANGER, Defendant.

This cause came on for trial upon the regular call of the docket, and the intervention of a jury was waived; the plaintiff, Oscar Rice, appeared in person and by his attorneys, Messrs. Ware, Biddle & Cory, and the defendant appeared in person and by J. D. McCleverty, his attorney, and the trial hereof proceeded before the court; and the court, having heard all *all* of the evidence introduced and the arguments of counsel and being fully advised in the premises, makes the following special findings of fact:

1. That Oscar Rice claims title to the north half of lot No. 12, block 102, in the city of Ft. Scott, Kansas, through a patent from the United States and intermediate conveyances to him, which patent and deeds are regular.

2. That said defendant claims title and interest in said lot by reason of two pretended tax deeds, the first dated the 16th day of September, 1881, and the second dated the 20th day of June, 1882.

3. That said first tax deed is based upon a sale of taxes for the year 1873, this sale being made May 21, 1874, for the taxes assessed against said lot for macadamizing the street in front of said lot, in the sum of $41.34, which includes the penalty, interest, and costs of 10 per cent.

4. That at the said sale of May 21st, 1874, the county treasurer bid in said property for Bourbon county, and the same remained unredeemed and unassigned until the 15th day of September, 1881, on which date there was issued and the county clerk assigned a tax-sale certificate to John F. Cottrell, who paid for the same to the treasurer of Bourbon county the sum of $192.59, as said Macadam tax, interest, and costs for the year 1873, and for which said deed was issued.

5. That said second tax deed was issued pursuant to a sale for taxes for the year 1874 on said real property, which sale was made September 15th, 1875, and was bid in by the county treasurer of Bourbon county for the said county for the sum of $24.79, being the whole amount of taxes, interest, and costs for the year 1874, and that said property remained unredeemed and unassigned until the 15th day of September, 1881, on which date a tax-sale certificate was issued to John F. Cottrell, he, at the time, paying the sum of $97.05 for the same, under a compromise with the county commissioners, for the taxes of 1874 to 1880, inclusive.

6. That the said tax deeds are both void on their faces.

7th. That the amounts mentioned in said deeds, with cost of deeds, recording the same, with 20 per cent. interest thereon from dates of deeds, together with $15 for cost of sidewalk, less rents, all amounting to $871.78, is allowed defendant under his tax deed.

8. Defendant Sanger and his grantor, by tenants, has had continu-

ous use and possession of said premises ever since the date of said tax deeds, and defendant still has the possession thereof.

19 9. That the defendant has a quitclaim deed from John F. Cottrell and wife to himself.

And as conclusions of law the court finds:

1. That Oscar Rice is the owner in fee simple of the real property above described, to wit, the north half of lot 12, block 102, in the city of Ft. Scott, Kansas, and is entitled to the possession thereof.

2. That the tax deeds under which said defendant claims an interest in said premises are void and convey no title in said property to him.

3. That the defendant is entitled to the sum of 857.03 for the taxes, interest, and costs for the years 1873 to 1886, inclusive, and $15 for costs of sidewalk, less five dollars, rent received, being a total of $871.78, which sum shall be paid before Oscar Rice shall be let into the possession of said property, and that upon such payment the said Oscar Rice shall be entitled to the possession of said property.

4. That the plaintiff is entitled to recover his costs.

To the 7th finding of fact and the 3rd conclusion of law the said Oscar Rice duly excepted and excepts.

It is therefore considered, ordered, and adjudged that Oscar Rice is the owner of the real estate in the petition described, to wit, the north half of lot 12, block 102, in the city of Ft. Scott, Bourbon county, Kansas, and is entitled to the possession of the same; that the defendant has no title to said premises; that his claim for taxes and improvements is $871.78, and that upon the payment to said defendant or the clerk of this court of said sum, with 7 per cent. interest from this date, the plaintiff is entitled to the possession of said premises, and that said Oscar Rice recover of said defendant the costs of this action, taxed at $16.00, for all of which execution is awarded.

To each and every of said findings of fact and conclusions of law and judgment defendant Sanger duly excepted and excepts."

Afterwards, on the 29th day of February, 1888, the plaintiff filed his motion to modify the judgment and findings theretofore entered and rendered herein, which motion is in words and figures as follows, to wit:

"In the District Court of Bourbon County, Kansas.

DAVID R. RICE and OSCAR RICE, by Leave of Court, Plaintiffs,
vs.
I. S. SANGER, Defendants.

Motion.

"Now comes the said Oscar Rice and moves the court to set aside the seventh finding of fact and the — conclusion of law and modify the judgment in favor of said Sanger for $871.78 to an amount the findings justify, for the reasons:

1st. That said amount is too large and is contrary to the findings of fact and conclusions of law.

20 2nd. Because said judgment is not justified by the evidence nor the findings and is contrary to law.

WARE, BIDDLE & CORY,
Att'ys for Oscar Rice."

Said motion is endorsed as follows:
"Filed Feb'y 29, 1888. B. Hudson, clerk."

Afterwards, on the 1st day of March, 1888, said motion was heard by the court and denied, as appears by journal entry as follows:

"Journal of the District Court, Bourbon County, Kansas, December Term, 1887, 1st Day of March, 1888.

DAVID R. RICE and OSCAR RICE, by Leave of Court, Plaintiffs,
vs.
I. S. SANGER, Defendant.

"This day this cause came on to be heard upon the motion of the plaintiff Oscar Rice to modify the judgment rendered against said plaintiff and in favor of said defendant by reducing the amount of said judgment. The court, having heard said motion and the argument of counsel thereon and being fully advised in the premises, overrules and denies the same. To this ruling of the court said plaintiff duly excepted and excepts."

Also on said 29th day of February, 1888, said defendant Sanger filed his motion to set aside said judgment and findings and for a new trial hereof; which motion is in words and figures as follows, to wit:

"In the District Court of Bourbon County, State of Kansas.

DAVID R. RICE and OSCAR RICE, Plaintiff-,
vs.
I. S. SANGER, Defendant.

Motion for a New Trial.

Now comes said defendant, I. S. Sanger, above named, and moves the court to set aside the findings and judgment heretofore entered and rendered herein and grant a new trial of this action, and as grounds therefor says:

1. That there is error in the assessment of the amount of recovery in favor of said defendant, in that the amount is too small.

Second. That the said findings and judgment and each and every of them are not sustained by sufficient evidence.

Third. That the said findings and judgment and each and every of them are contrary to law.

Fourth. For error of law occurring at the trial and excepted to by said defendant at the time.

Fifth. That said findings and judgment and each and every of them should have been in favor of the said defendant.

J. D. McCLEVERTY,
Defendant's Attorney."

Said motion is endorsed as follows:
"Filed February 29, 1888. B. Hudson, clerk."

21 Afterwards, on the first day of March, 1888, said motion was heard by the court and denied, as appears by journal-entry as follows:

"Journal of the District Court, Bourbon County, Kansas, December Term, 1887, 1st Day of March, 1888.

DAVID R. RICE and OSCAR RICE, by Leave of Court, Plaintiffs,
vs.
I. S. SANGER, Defendant.

"This day this cause came on to be heard upon the motion of the defendant to set aside the findings made and the judgment rendered herein and grant a new trial hereof; and the court, having heard said motion and the argument of counsel thereon and being fully advised in the premises, overrules and denies the same. To this ruling of the court the defendant duly excepted and excepts. Thereupon the defendant is given 40 days to make and serve a case made upon the plaintiff herein, and the plaintiff is given ten days thereafter within which to suggest amendments to said case made, and five days are allowed the parties hereunto to present said case made to the judge of this court for settlement and signing.

The said defendant, I. S. Sanger, hereby presents the above and foregoing as a true and complete case made, containing and showing all of the record, pleadings, and proceedings in said cause except process, all of the evidence given and offered at the trial thereof with the objections thereto and the rulings of the court thereon and the exceptions of counsel thereto, and asks that it be signed and allowed as such and ordered to be filed and attested as a true case made.

J. D. McCLEVERTY,
Attorney for Defendant Sanger.

Case served March 22, 1888.

WARE, BIDDLE & CORY,
Pl'ff's Att'ys.

We have no amendments to suggest, all being incorporated by consent.

WARE, BIDDLE AND CORY,
Pl'ff's Attorneys.

STATE OF KANSAS, *Bourbon County,* } *ss:*

I, C. O. French, judge of the district court in and for Bourbon county, State of Kansas, sixth judicial district, do hereby certify

that the above and foregoing record in the case of David R. Rice and Oscar Rice, by leave of court, plaintiffs, *vs.* I. S. Sanger *et al.*, defendants, lately tried in said court, having been served as and for a case made upon said Oscar Rice by said I. S. Sanger, as provided by the order of the said court therein, and no suggestions of amendments thereto having been made by the said Oscar Rice, the same is by me hereby settled and allowed as a true case made, showing and containing all of the pleadings and record in said cause, all of the evidence given and offered upon the trial thereof, with the rulings of the court thereon and exceptions thereto and all journal entries, rulings, orders, and decisions of said court made in said case, and the clerk of said court will attach the seal of said
22 court hereto and will attest and file this as a true case made, as provided by law.

Witness my hand, at Fort Scott, in said county and State, this 24th day of April, 1888.

C. O. FRENCH,
Judge 6th Jud. Dist., Kansas.

STATE OF KANSAS, }
Bourbon County, } *ss:*

I, B. Hudson, clerk of the district court in and for said county and State, do hereby certify that the signature attached to the above and foregoing certificate and order is the true signature of the Hon. C. O. French, judge of the district court in and for Bourbon county, State of Kansas, 6th judicial district; and, pursuant to said order, I do hereby attest and file this and attach hereto the seal of said court as a true case made in the said case of D. R. Rice and Oscar Rice, by leave of court, plaintiffs, *vs.* I. S. Sanger *et al.*, defendants, lately tried in said court.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Fort Scott, in said county, this 25th day of April, 1888.

[SEAL.]

B. HUDSON,
Clerk of the Dist. Court, Bourbon County, Kansas.

Filed April 25th, 1888.

B. HUDSON,
Clerk Dist. Court.

[Endorsed:] I. S. Sanger *vs.* David R. Rice *et al.* Petition in error and case made. Filed May 14, 1888. C. J. Brown, clerk supreme court.

23 And thereafter, on the 5th day of March, 1890, the same being one of the regular judicial days of the January term, 1890, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

JANE SANGER, Administratrix, etc., Plaintiff in Error,
vs.
DAVID R. RICE *et al.*, Defendants in Error.

This cause comes on to be heard on the petition in error, the cross-petition in error, and the transcript of the record of the district court of Bourbon county; and also comes on to be heard the motion of plaintiff in error to strike out the cross-petition in error; and thereupon, after oral argument by J. D. McCleverty, for the plaintiff in error, and by E. C. Cory, for the defendants in error, the said cause and motion are submitted on the brief of counsel for both parties and taken under advisement by the court.

24 And afterwards, on the 4th day of April, 1890, the same being one of the regular judicial days of the January term, 1890, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

JANE SANGER, etc., Plaintiff in Error,
vs.
DAVID RICE and OSCAR RICE, Defendants in Error.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be reversed and that the cause be remanded for further proceedings, in accordance with the views of this court as expressed in its written opinion filed herein. It is further ordered that the defendants in error pay the costs of this case in this court, taxed at $—, and hereof let execution issue.

25 And also on the 4th day of April, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas the syllabus and opinion of the court in said cause, which are in the words and figures as follows, to wit:

26 JANE SANGER
vs.
DAVID R. RICE and OSCAR RICE. } No. 5250.

Error from Bourbon county. Reversed.

Syllabus.

By the court—VALENTINE, *J.*:

1. Ordinarily a tax deed should be strictly construed, but where a tax deed has been of record for more than five years and the claimant under it has been in the actual possession of the property conveyed by it during all that time, making improvements thereon, and no person claiming to have any interest in the

property at any time during the period that elapsed from the time when the taxes were first levied upon the property till after more than five years had elapsed from the time of the recording of the tax deed has ever made any claim to the property as against the claimant under the tax deed, but only a person claiming under a quitclaim deed executed after more than five years had elapsed from the date of the recording of the tax deed, and for the expressed consideration *on* only $1, has ever attempted to disturb the rights of the party claiming under the tax deed, and where such tax deed, if it were so construed as to make the facts therein stated correspond precisely with the actual facts, would necessarily be held to be valid, such tax deed should be liberally construed for the purpose of upholding and enforcing it.

2. And further held that the tax deed in question does not show affirmatively and upon its face that the tax-sale certificate was assigned for only a portion of the taxes remaining due and unpaid at the date of the assignment.
3. Where a tax deed executed in 1881 upon a tax sale made in 1874 for taxes levied in 1873 recites that the assignment of the tax-sale certificate was made by the county and does not specifically say that it was made by the county clerk, held sufficient.
4. Although a "Macadam tax" levied and assessed by a city of the second class is only a "special assessment for improvements," yet it is such a tax that when certified by the city clerk to the county clerk and placed on the county tax-roll the property against which it is assessed may be sold for such tax and a tax deed may be executed upon such sale.
5. And such a tax deed, if sufficient in form, will be *prima facie* valid.

All the justices concurring.

A true copy.
Attest:

____ ____,
Clerk Supreme Court.

27 JANE SANGER
vs.
DAVID R. RICE and OSCAR RICE. } No. 5250.

Error from Bourbon county.

Statement.

This was an action in the nature of ejectment brought in the district court of Bourbon county on June 3, 1887, by David R. Rice against I. S. Sanger and others to recover the north half of lot number twelve, in block number 102, in Fort Scott, Kansas. Afterward Oscar Rice was substituted as plaintiff in the place of David R. Rice. The case was tried before the court without a jury, and the court made special findings of fact and conclusions of law, and upon such

findings and conclusions rendered judgment in favor of the plaintiff and against the defendant for the property in controversy, but on the other side rendered judgment that the defendant Sanger was entitled to receive from the plaintiff for taxes paid and improvements made by Sanger the sum of $871.78. It is not necessary to give a copy of the findings of fact or conclusions of law, but, as the principal question involved in this case is whether a certain tax deed is valid or not upon its face, it will be proper to give a copy of such tax deed. Such tax deed, omitting the acknowledgement, reads as follows:

"Know all men by these presents that—

Whereas the following-described real property, viz., north half of lot No. twelve (12), in block No. one hundred and two (102), in the city of Fort Scott, situated in the county of Bourbon and State of Kansas, was subject to taxation for the year A. D. 1873; and

Whereas the taxes assessed upon said real property for the year aforesaid remained due and unpaid at the date of the sale hereinafter mentioned; and

Whereas the treasurer of said county did, on the 21st day of May, 1874, by virtue of the authority in him vested by law, at the sale begun and publicly held on the first Tuesday of May, A. D. 1874, expose to public sale, at the county-seat of said county, in substantial conformity with all the requisitions of the statute in such cases made and provided, the real property above described for the payment of the taxes, interest, and costs then due and remaining unpaid upon said property; and

Whereas at the time and place aforesaid, there being no bidders for said property, said property could not be sold for the amount of taxes and charges thereon, said N. half lot 12, block 102, in the city of Fort Scott, Kansas, was bid off by the county treasurer for the county of Bourbon for the sum of forty-one dollars and thirty-four cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on said property; and

Whereas the said county of Bourbon did, on the 15th day of September, A. D. 1881, duly assign the certificate of the sale of the property as aforesaid and all its right, title, and interest to said property to John F. Cottrell, of the county of Bourbon and
28 State of Kansas, for the sum of one hundred and ninety-two and $\frac{50}{100}$ dollars, in full of taxes, costs, and interest on said property for the year 1873 for Macadam tax only; and

Whereas over three years have elapsed since the date of said sale and the said property has not been redeemed therefrom, as provided by law:

Now, therefore, I, L. B. Welch, the county clerk of the county aforesaid, for and in consideration of the said sum of one hundred and ninty-two dollars and fifty-nine cents, taxes, costs, and interest due on said lands for the years aforesaid, to the treasurer paid as aforesaid, and by virtue of the statute in such cases made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said John F. Cotterell, his heirs

and assigns, the real property last hereinbefore described; to have and to hold unto him, the said John F. Cottrell, his heirs and assigns forever, subject, however, to all the right of redemption provided by law.

In witness whereof I, L. B. Welch, the county clerk as aforesaid, have hereunto subscribed my name and affixed the official seal of said county on the 16th day of September, A. D. 1881.

[SEAL.] L. B. WELCH,
County Clerk."

The defendant Sanger, as plaintiff in error, brought the case to this court, making David R. Rice and Oscar Rice defendants in error. Since the case was brought to this court Sanger died, and the action has been revived in the name of Jane Sanger, individually and as administratrix.

29 JANE SANGER
vs.
DAVID R. RICE and OSCAR RICE.

Error from Bourbon county. Reversed.

The opinion of the court was delivered by VALENTINE, *J.*:

The substantial question involved in this case is, Who owns the north half of lot number twelve, in block number 102, in Ft. Scott? The title of the defendants in error, plaintiffs below, is as follows: It is admitted that William Shaeffer, prior to his death and by a chain of title from the Government down to himself, owned the property in controversy. After his death and on April 23, 1887, his heirs, by a quitclaim deed, for the expressed consideration of $1, conveyed the property to David R. Rice, and on December 26, 1887, David R. Rice and wife, by a quitclaim deed, for the expressed consideration of $1, conveyed the property to Oscar Rice. The title of the plaintiff in error, defendant below, is founded upon a tax deed executed by the county clerk of Bourbon county to John F. Cottrell on September 16, 1881, for taxes of 1873, and recorded on September 19, 1881, and a quitclaim deed executed by Cottrell and wife to I. S. Sanger on July 10, 1882, and the actual possession of the property by Sanger and his grantor from the date of the tax deed to the present time, and paying all the taxes and making improvements thereon. As the tax deed had been of record for more than five years before this action was commenced, and as the parties holding under the same were in the actual possession of the property during all that time, and as, except for the tax deed, the plaintiff below, Rice,
30 would hold the legal title to the property, it is admitted by both parties that the only question involved in the case with regard to the title is whether the tax deed is void or valid upon its face.

The facts of the case concerning the taxes and the tax proceedings as shown by the evidence outside of the tax deed and stated very briefly are substantially as follows: In the year 1873 the property in controversy was taxed for various purposes, and these taxes were placed

upon the tax-rolls of Bourbon county. An amount was also assessed against the property by the city of Ft. Scott for macadamizing the street immediately in front of such property, which amount was also placed upon the tax-rolls of the county for that year and was designated and known as a "Macadam tax." All the taxes except this Macadam tax were paid, and this Macadam tax was not paid. On May 21, 1874, the property was offered for sale for this M-cadam tax, and there being no bidders, it was bid off by the county treasurer for the county of Bourbon. On September 15, 1881, John F. Cottrell paid into the county treasury the sum of $192.59, being the amount that would be required at that time to redeem the property from the taxes, and received a certificate therefor from the county treasurer, which certificate and all the interest of Bourbon county in and to the property in controversy were, for the consideration above named, assigned to Cottrell by the then county clerk of Bourbon county, and on the next day the tax deed was executed by the county clerk to Cottrell. These facts are certainly sufficient, if the tax deed properly states them, to give to the tax-deed holder a good title. It is claimed, however, on the part of Rice that the
31 tax deed does not state the real facts, and that the facts which it does state render it void upon its face, and this for the following reasons:

First. It is claimed that the tax deed shows that prior to the time of the tax sale other taxes besides the Macadam tax had been assessed and levied upon the property in controversy for the year 1873; that all these taxes were still due and unpaid at the date of the sale; that the property was sold for all such taxes; that they all remained due against the land up to the assignment of the tax-sale certificate, and that the tax-sale certificate was assigned, not for all of them, but for the Macadam tax only.

Second. It is further claimed that the assignment of the tax-sale certificate was not made by the county clerk.

Third. It is also claimed that a Macadam tax is no tax at all, but only a "special assessment for improvements," and that there is no law authorizing a tax sale or a tax deed for special assessments.

Fourth. It is also claimed that although the Macadam tax is a special assessment for improvements and nothing else, yet that, under the law, there can be no assessor in such a case, and that, as a tax deed is *prima facie* evidence only "from the valuation of the land by the assessor, inclusive, up to the execution of the deed" (tax law, section 138), a tax deed founded only upon a special assessment for improvements cannot be evidence of anything; that, as there can be no assessor in such a case, there can be no starting point for the tax deed to begin to be evidence of anything.

Ordinarily tax deeds should be strictly construed, but under the circumstances of this case we think the present tax deed ought to be liberally construed for the purpose of upholding and enforce-
32 ing it.

First. Public officers are always presumed to do their duty.

Second. Section 139 of the tax law reads as follows:

"SEC. 139. No irregularity in the assessment-roll nor omission

from the same, nor mere irregularities of any kind in any of the proceedings, shall invalidate any such proceeding or the title conveyed by the tax deed; nor shall any failure of any officer or officers to perform the duties assigned him or them, upon the day specified, work an invalidation of any such proceedings or of said deed."

Third. Section 141 of the tax law reads as follows:

"SEC. 141. Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of lands sold for taxes, or to defeat or avoid a sale or conveyance of lands for taxes, except in cases where the taxes have been paid or the land redeemed as provided by law, shall be commenced within five years from the time of recording the tax deed, and not thereafter."

Fourth. The present tax deed was recorded more than five years before this action was commenced, and during all that time the claimants under it had the actual possession of the property conveyed, making improvements on it.

Fifth. And no person claiming to have any interest in the property at any time during the period that elapsed from the time when the taxes were first levied upon it in 1873 till after more than five years had elapsed from the recording of the tax deed has ever made any claim to the property as against the claimants under the tax deed.

Sixth. But only *p*resons holding under a quitclaim deed executed after more than five years had elapsed from the date of the recording of the tax deed and for the expressed consideration of only one dollar have ever attempted to disturb the rights of the parties claiming under the tax deed.

Seventh. If the tax deed should be construed so as to make the facts therein stated correspond precisely and exactly with the real facts of the case, then the tax deed would necessarily be held to be valid.

33 It is claimed by counsel for Rice that the tax deed shows upon its face that other taxes than the Macadam tax were assessed and levied upon the property for the year 1873, and that at the time of the tax sale all these taxes so assessed or levied were still due and unpaid, and remained so down to the assignment of the tax-sale certificate, when such certificate was assigned to Cottrell for the Macadam tax only. Now, really there is nothing in the tax deed that shows what taxes were levied or assessed upon the property except the Macadam tax. Were there any others? It can hardly be said that the tax deed shows it; and it is possible for all the ordinary taxes to be omitted from the tax-rolls of the county and a special assessment for improvements like a Macadam tax to be put on the tax-rolls, for the ordinary taxes in a city of the second class are founded upon an assessment made by the regular city assessor and placed originally upon the tax-rolls by the county clerk, while special assessments like Macadam taxes are founded upon an assessment made by three appraisers appointed by the mayor and council, and are certified by the city clerk to the county clerk and then put on the tax-rolls. Besides, it is evident from the entire tax deed, including all its parts, that the county clerk did not mean to

say that there was any tax due upon the property at the time of the tax sale other than the Macadam tax, and such was not the fact. The second whereas is the only portion of the tax deed from which it might be inferred that other taxes than the Macadam tax were still due against the property and unpaid at the date of the
34 tax sale, and this is scarcely any evidence, for the object of that whereas is not to show what taxes are still due and unpaid or to describe any of the taxes, but only to show that the property sold was subject to sale for delinquent tax, and one tax for this purpose is as good as twenty. Of course the whereas should be broad enough in its statement to include all the delinquent taxes, but where it is too broad, as is claimed in this case, no particular harm can be done; but suppose there were other taxes than the Macadam tax still due against the property at the time of the tax sale, may not a portion of them have been paid after the tax sale and before the assignment of the tax-sale certificate, leaving only the Macadam tax still due against the property at the time the tax-sale certificate was assigned? We do not think that the tax deed in this respect shows upon its face and affirmatively what counsel for Rice claims that it does; and, certainly, at this late day it should not be held to be void for any such reason.

We also think that the tax deed sufficiently shows that the assignment of the tax-sale certificate was made by the county clerk of Bourbon county, for the tax deed recites that it was duly assigned by Bourbon county, and it could not have been duly assigned by Bourbon county unless it was assigned by the county clerk. The statutes require that when property is offered for sale for delinquent taxes and when there are no bidders the property shall be bid off by the county treasurer for the county, and when any person shall desire to purchase the county's interest in the property and shall pay the amount required therefor the treasurer shall issue to
35 such person a tax-sale certificate, and the county clerk shall then assign the certificate to the purchaser, and such certificate and assignment "shall vest all the interest of the county in or to such land or town lot in such person." Tax law of 1868, sec. 91; tax law of 1876, sec. 117. Prior to the tax law of 1876 the statute did not require that the tax deed should state that the county clerk had assigned the tax-sale certificate, but it left the county clerk, in executing the tax deed, to state the fact of assignment in any appropriate language which he might choose to use, and section 155 of the tax law of 1876 reads as follows:

"SEC. 155. All matters relative to the sale and conveyance of lands for taxes under any prior statute shall be fully completed according to the laws under which they originated, the same as if such laws remained in force."

See also Watkins *vs.* Inge, 24 Kas., 612.

We think that the tax deed in this case fairly shows by unavoidable implication that the assignment of the tax-sale certificate was made by the county clerk, and such was the fact. In fact, every-

thing was done that was necessary to be done in order to make the tax deed a good tax deed.

It is claimed, however, by counsel for Rice that a "Macadam tax" is no tax at all, but only a "special assessment for improvements;" and they further claim that there is no law authorizing a tax sale for special assessments for improvements, and therefore that the tax sale in the present case and the tax deed founded thereon are absolutely void. Their principal authority for this claim is section 33 of the act of 1872, relating to cities of the second class, which reads, so far as it is necessary to quote it, as follows:

36 "SEC. 33. The assessments made pursuant to the third clause of the second subdivision of the preceding section shall be known as "special assessments for improvements," and except as hereinafter provided, shall be levied and collected as one tax in addition to the taxes for general revenue purposes, and shall be certified by the city clerk to the county clerk, to be placed on the tax-roll for collection, subject to the same penalties, and collected in like manner as other taxes under existing laws."

Now, while it is true that a "Macadam tax" is a special assessment for improvements, yet it is also a tax, and the section of law relied on by counsel for Rice to show otherwise shows that it is a tax, and also shows that it may be placed upon the tax-roll of the county for collection and may be collected in the same manner as other taxes are collected under existing laws. See also section 43 of the act last mentioned.

But after claiming that this "Macadam tax" is no tax at all, but only an assessment, then they virtually claim that it is not an assessment, and this for the reason, as they claim, that there can be no assessor. It is true that the assessors in such cases are not called assessors. They are called appraisers. They are "three disinterested appraisers appointed by the mayor and council." Section 32 of the act relationg to cities of the second class. They ascertain, appraise, and assess the value of the property, and upon this valuation the amount of the assessment or tax, or whatever it may be called, is fixed. This claim that there are no assessors in a case of special assessments or "Macadam tax" is made for the purpose of destroying the *prima facie* character of the tax deed in this case, for the statute does not provide that a tax deed shall be *prima*

37 *facie* evidence, except "from the valuation of the land by the assessor, inclusive, up to the execution of the deed." Tax law, sec. 138. We think the appraisers of the property in cases like this are virtually assessors, and therefore this point against the tax deed can have no force; but even if the appraisers are not assessors, still if we call the Macadam tax a special assessment for improvements, there must be an assessor or assessors. There can hardly be an assessment without an assessor.

We have now considered every objection urged by counsel for Rice against the tax deed, and we do not think that any one or more of them or all together are sufficient to defeat the tax deed.

The judgment of the court below will be reversed and cause remanded for further proceedings.

All the justices concurring.

A true copy.
Attest:

——— ———,
Clerk Supreme Court.

38 And afterward, on the 5th day of June, 1890, the same being one of the regular judicial days of the January term, 1890, of the supreme court of the State of Kansas, before said court, in session at the supreme-court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

JANE SANGER, Administratrix, Plaintiff in Error,
vs.
DAVID RICE *et al.*, Defendants in Error.

Now comes on for decision the motion for a rehearing of this cause; and thereupon it is ordered that the said motion be overruled.

The defendants in error and each of them duly excepted to the ruling of the court.

39 And afterward, on the 12th day of September, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for the writ of error, which is in the words and figures as follows, to wit:

The United States of America to the honorable the chief justice of the State of Kansas:

Your petitioner, Oscar Rice, respectfully shows that on April 4, 1890, the supreme court of the State of Kansas rendered a final judgment against your petitioner in a certain cause, wherein Jane Sanger was plaintiff in error and Oscar Rice was defendant in error, reversing a judgment of the district court of Bourbon county, State of Kansas, in favor of said Oscar Rice. The judgment of the said district court of Kansas gave your petitioner the possession of the north half of lot No. twelve, in block No. one hundred and two, in the city of Fort Scott, in Bourbon county, Kansas, and the reversal of said judgment deprived your petitioner of the said property, the value of which was then and is now greater that $5,000. The foregoing will appear by reference to the record and proceedings in said cause. The said supreme court of Kansas is the highest court of said State in which a decision in said suit could be had.

Your petitioner claims the right to remove said judgment and proceedings to the Supreme Court of the United States by writ of error under the Revised Statutes of the United States because in said suit the said Oscar Rice claimed a right *ot* said land by purchase under the laws and decisions of the State of Kansas theretofore rendered, and the decision of the said supreme court of Kansas,

this petitioner claims, impaired the obligation of the contract under which the plaintiff, in the district court of the State, claimed title.

40 Wherefore your petitioner claims that the said decision of the supreme court was unconstitutional and should be reversed by the Supreme Court of the United States, as will appear by the record; and your petitioner prays the allowance of a writ of error, returnable into the Supreme Court of the United States, and for a citation; and your petitioner will ever pray.

WARE, BIDDLE AND CORY,.
Att'ys for Petitioner.

Let the writ of error issue upon the petitioner, Oscar Rice, entering into an undertaking to the said Jane Sawyer in the sum of $500.00, conditioned as by law in such cases made and provided, for costs only, and not to act as a supersedeas.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

August 9th, 1890.

41 And also on the 12th day of September, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas an appeal bond, which is in the words and figures as follows, to wit:

Supreme Court of the United States.

OSCAR RICE *et al.*, Plaintiffs in Error,
vs.
JANE SANGER, Administratrix, &c., Defendant in Error.
} In Error to the Supreme Court of Kansas.

Know all men by these presents that we, Oscar Rice, as principal, and R. P. Rice & F. M. Yost, as sureties, are held and firmly bound to the defendant in error in the sum of $500.00, to be paid to said defendant in error; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors, and asministrators jointly, by these presents.

Sealed with our seals and dated this 8th day of September, 1890.

Whereas the above-named plaintiffs in error have prosecuted their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of the State of Kansas:

Now, therefore, the condition of this obligation is that if the above-named plaintiffs in error shall prosecute this said writ of error to effect and answer all costs that may be adjudged or awarded against them if they shall fail to make good this plea, then this obligation to be void; otherwise in full force.

OSCAR RICE.
R. P. RICE.
F. M. YOST.

42 STATE OF KANSAS, } ss:
Bourbon County, }

R. P. Rice and F. M. Yost, being duly sworn, on oath depose and say:

We are sureties on the above and foregoing bond and we are worth the sum of $1,000.00 over and above all debts, liabilities, and exceptions.

R. P. RICE.
F. M. YOST.

Subscribed and sworn to before me this 8th day of Sept., 1890.
FRANK CUNNINGHAM, [SEAL.]
Notary Public.

My commission expires October 16th, 1893.

Taken and approved by me this 8th day of September, 1890.
A. H. HORTON,
Chief Justice of the Supreme Court of Kansas.

43 And also on the 12th day of September, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error, which is in the words and figures as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, being the highest court of law or equity in said State in which a decision could be had in the said suit between Jane Sanger, plaintiff in error, & Oscar Rice, defendant in error, wherein was drawn in question the constitutionality of said decision as impairing the obligation of contracts, a manifest error hath happened, to the great damage of the said Oscar Rice, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States of America, this 10th day of Sept., A. D. 1890.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

G. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed.

—— ——, *Judge.*

44 And afterward, on the 30th day of March, 1891, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation in the above-entitled cause, with acknowledgement of service endorsed thereon, which is in the words and figures as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

To Jane Sanger, administratrix, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Kansas, wherein Oscar Rice *et al.* are plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment mentioned shall not be corrected and speedy justice should not be done to the parties in this behalf.

Service of citation in the above case waived and appearance of Jane Sanger, administratrix, hereby entered in the Supreme Court of the United States; this, however, to have no other effect than if a citation had been officially served; all other rights reserved.

Witness my hand this 27th day of March, A. D. 1891.

J. D. McCLEVERTY,
Att'y for Jane Sanger.

[Endorsed:] Filed Mar. 30, 1891. C. J. Brown, clerk sup. court.

45 In the Supreme Court of the State of Kansas.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, and complete transcript of all pleadings and papers filed and of all proceedings had in said court in the above-entitled cause as the same remain on file and of record in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of the State of Kansas affixed hereto, at my office, in the city of Topeka, this 18th day of May, 1891.

C. J. BROWN,
Clerk Supreme Court of the State of Kansas.

46 Supreme Court of the United States.

OSCAR RICE, Plaintiff in Error,
vs.
JANE SANGER, Defendant in Error.

Stipulation.

Whereas the clerk of the supreme court of Kansas, in making up the record in the above-entitled case, omitted, by oversight, the motion for a rehearing filed therein by said Rice April 17th, 1890:

Now, in order to save the expense of the issuance of a writ of certiorari, we do hereby stipulate that a copy of said motion, hereto attached and duly certified by the clerk of the said supreme court of Kansas, be inserted in said record as page No. 37 B, and that it be deemed and taken as a part of said record.

E. T. WARE,
Attorney for Plaintiff in Error.
J. D. McCLEVERTY,
Attorney for Defendant in Error.

47 In the Supreme Court of the State of Kansas.

JANE E. SANGER, for Herself and as Administratrix of the Estate of I. S. Sanger, Deceased, Plaintiff in Error,
vs.
OSCAR RICE, Defendant in Error.

Motion for Rehearing.

Now comes the said defendant in error and moves the said court for a rehearing of the cause above entitled and to set aside the order and decree made in said case by said court for the reasons following, to wit:

1st. Said court upon the former hearing evidently misapprehended the facts as stated in the record in said case.

2nd. That the decision of said court in said action is contrary to law and is not sustained by precedent.

3rd. That the said decision is contrary to the adjudications heretofore made by said court and impairs the obligation of contracts.

WARE, BIDDLE AND CORY,
Attorneys for Defendant in Error.

[Endorsed:] Jane E. Sanger *vs.* Oscar Rice. Motion for rehearing. Filed April 17, 1890. C. J. Brown, clerk supreme court.

In the Supreme Court of the State of Kansas.

I hereby certify that the above and foregoing is a full, true, and complete copy of the motion for a rehearing in the above-entitled cause as appears of record and on file in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of said supreme court affixed hereto, at my office, in the city of Topeka, this 29th day of September, 1891.

C. J. BROWN,
Clerk Supreme Court.

[Endorsed:] Case No. 14,874. Term No., 1400.

48 [Endorsed:] Supreme Court U. S. 1891, October term. No. 1400. Oscar Rice, pl'ff in error, — Jane Sanger, adm'x. Stipulation & addition to record.

[Stamped:] Office Supreme Court U. S. Filed Oct. 31, 1891. James H. McKenney, clerk.

Endorsed on cover: Case No. 14,874. Kansas supreme court. No. 1400. Oscar Rice, plaintiff in error, *vs.* Jane Sanger, administratrix. Filed October 5, 1891.

Office Supreme Court U. S.
FILED.
OCT 19 1891
JAMES. H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OSCAR RICE, *Plaintiff in Error,*
vs.
JANE SANGER, *Defendant in Error.*

Question Involved.

Plaintiff in Error brings a case from Supreme Court of Kansas upon the theory that the ruling of said State Supreme Court overturns an established rule of property in Kansas, and thereby impairs the obligation of contracts.

The Defendant in Error moves to dismiss on the ground that no Federal question is involved.

Brief of Plaintiff in Error.

E. F. WARE, Attorney.

The Monitor Book & Printing Co., Fort Scott, Kansas.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OSCAR RICE, *Plaintiff in Error*,
vs.
JANE SANGER, *Defendant in Error.*

Brief of Plaintiff in Error.

This suit was taken by Writ of Error from Supreme Court of Kansas to Supreme Court of United States.

Plaintiff in Error here claims that the decision of the Supreme Court of Kansas impaired the obligation of a contract.

Defendant in Error here moves to dismiss on ground that no Federal question is involved.

The first question to be decided is: Is there a Federal question involved? Upon that subject this brief is prepared.

The merits of the case and the discussion thereof will be left to a future brief if the motion be overruled

Plaintiff in error here claims that the law and the fact in this case as shown by the record in this case and by the statutes and decisions of Kansas are as follows:

From the heirs of a deceased non-resident of Kansas,—the heirs also being non-resident—another non-resident purchased a valuable vacant lot in Fort Scott, Kansas, that had upon it, two tax deeds, void upon their faces, held by a resident of Kansas who was in possession of said property. He, in order to have the insigna of possession, rented the land to parties to build a hencoop on; to cut stone on; and sometimes erect a circus bill board thereon and received a total of about $25.00 in rents, a part of which he spent in putting down a sidewalk in the street fronting on the property. The fee of said street being in the County.

The non-resident purchaser brought an action of ejectment, to which the Defendant did not file any denial, but instead thereof counter claimed an action of quiet title, a method of practice common in Kansas.

By purchase and descent this Plaintiff in Error succeeds to all the rights of the original plaintiff and this Defendant in Error succeeds to all the rights of the original Defendant.

On final trial in the State District Court the Plaintiff recovered a judgment, the Court holding that under the law of Kansas the said two tax deeds were void upon their faces. The title of the Plaintiff otherwise was concededly

perfect and the defendant had no other title except the tax deeds.

This Plaintiff in Error claims that by the former decision of the Supreme Court of Kansas and by the uniform decisions of the state the said tax deeds were void upon their faces, and that there were no decisions to the contrary and the said decisions had become a rule of property in said state and the plaintiff bought upon the faith of said decisions and rule of property.

The Supreme Court of Kansas, to which the case was taken, in fact, but not in express language, reversed its former decisions and changed its former rulings, and said court held one deed void upon its face and held the other good.

This plaintiff then duly filed a motion for a rehearing in Supreme Court of Kansas, assigning the following grounds among others:

2nd.—"That the decision of said court in said action is contrary to law, and is not sustained by precedent.

3rd—"That the said decision is contrary to the adjudications heretofore made by said Court, *and impairs the obligation of contracts.*"

This the Supreme Court of Kansas overruled.

IS A FEDERAL QUESTION INVOLVED?

Upon that proposition we cite the syllabus of Olcott vs. Supervisors, 16 Wallace, 678, (1872).

"If a contract when made was valid under the Constitution and laws of a state as they had been previously expounded by its *judicial tribunals* and as they were understood at the time, no subsequent action by the legislature *or the judiciary* will be regarded by this Court as establishing its invalidity."

This opinion was afterwards affirmed and enlarged in 1885, by this Court in Anderson vs. Santa Anna, 116 U. S., 356.

The Court says:

"In Burgess vs. Seligman, 107, U. S. 20, 33, the Court had occasion to re-examine all its prior adjucations concerning the obligation of the Federal Court to follow the decision of the State Court upon questions of local law."

Mr. Justice Bradley, speaking for the whole Court, after observing that the Federal Court had an independent jurisdiction in the administration of State laws co-ordinate with, and not subordinate to, that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of these laws said, "So, when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or where there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony, and to avoid confusion, the Federal Court will lean to an agreement of

views with the State Courts, if the case seems to be balanced with doubt." Any other rule, it was further said, would defeat the very object of giving to the National Courts jurisdiction to administer the laws of the State in controversies between citizens of different States."

The said case of Olcott vs. Superervisor is referred to in the following adjucations of this Court:

20 Wallace, 662.	107 U. S., 35.
94 U. S., 206, 642.	109 U. S., 37.
100 U. S., 52.	116 U. S., 362.
105 U. S., 70, 76, 295.	19 Wall 91, 678

As the Defendant in Error truly says, the only real question in the case is the validity of one tax deed.

If it is valid, then our deeds are worthless, and the title we have purchased is bad.

If the Supreme Court of Kansas had decided in line of its former decisions, the tax deed would have been held void, and we would have been compelled to pay back to the holder thereof every dollar the tax deeds cost, together with all expenses and penalties and twenty per cent interest thereon, amounting to $871.78, being about one-tenth the value of the lot, making a fine investment for the tax deed holder.

The question is not one of possession, for under a void tax deed a fifteen years possession is required to give title, and the Defendant in error never claimed any such possession, as is shown by the record.

After the Supreme Court of Kansas had reversed the local court, and held the tax deed valid on its face, the

case was practically decided, for if the deed was good the defendant's title was good. There was no alternative but to submit or appeal. The latter course was taken and case brought here.

SUBSEQUENT PROCEEDINGS.

2nd. When the case was sent back to the local court from the Supreme Court, there was nothing really to try. No supersedeas bond was given by Plaintiff Rice. It was not necessary. The case was called up in the local court, and compliant with the rulings of the Supreme Court, the local court held the tax deed good and rendered judgment for Defendant Sanger, to all of which Plaintiff Rice duly excepted, as shown by the record.

As shown by a copy of the proceedings attached to the motion under discussion, the said Rice objected to all of the rulings and decisions of the local court. To the order spreading the mandate upon the journal, the setting aside of the former decision and the rendering of the new—to all he excepted.

Plaintiff Rice did not stay the proceedings—could not stay them—but relied upon the Supreme Court of the United States, and reasoned that if the Supreme Court of the United States reversed the Supreme Court of the State upon the question involved, that the Supreme Court of the State would be obliged then to affirm the original decision of the local court in favor of Rice. That thereupon the mandate of the Supreme Court of the State to the local court theretofore given to retry the case would be waste

paper, and the action of the local court in setting aside the former decision of the local court and retrying the case by order of the Supreme Court of the State would be a nullity, as the said Rice excepted to the rulings.

Any other theory would make justice belong to him who could give large enough bond to preserve as against the defeated party the rulings that had been gained upon the merits. An outside purchaser of the property might question the *pendente lite*, but as between the parties we feel that the decision of the Supreme Court of the United States in our favor in this matter will restore us the property.

To the statement, in brief of Defendant in Error, that both sides tried the case upon theory of a five years' statutory limit of possession, we enter a denial. The only question ever involved was the validity upon its face of the tax deed, and it is the only one now, and the Defendant in Error so says in the first paragraph of his brief.

Respectfully submitted.

E. F. WARE,

Attorney for Plaintiff in Error.

Fort Scott, Kansas, Oct., 1891.

Office Supreme Court U. S.
FILED.
OCT 10 1891
R. McKENNEY.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

OSCAR RICE, *Plaintiff in Error.*
vs.
JANE SANGER, *Defendant in Error.*

14400

BRIEF OF DEFENDANT IN ERROR UPON MOTION TO DISMISS.

J. D. McCLEVERTY,
Atty. for Deft. in Error.

JAMES A. MOULTON, PRINTER, FORT SCOTT, KANSAS.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

OSCAR RICE, *Plaintiff in Error.*
vs.
JANE SANGER, *Defendant in Error.*

BRIEF OF DEFENDANT IN ERROR UPON MOTION TO DISMISS.

STATEMENT.

The defendant in error relies upon two grounds in the motion to dismiss:

1st. That this is an action in ejectment in which the real and only question is the validity of a tax-title deed, issued under the laws of Kansas, under which the defendant, Jane

Sanger, holds title and possession. Hence that there is no federal question involved.

2d. That after the decision of the Supreme Court of Kansas, which the plaintiff in error now seeks to review, the case in due course of proceedure was remanded to the District Court of Bourbon County, and at the succeeding term of that court, on June 2d, 1890, the mandate of the Supreme Court was duly entered of record, the judgment now attacked set aside and the case tried over again, resulting in a judgment for the defendant, Jane Sanger, and from which no appeal or proceedings in error were taken. Hence the plaintiff in error, having again submitted to the jurisdiction of the trial court, and lost his case, cannot thereafter, as he is now attempting to do, prosecute this proceeding.

ARGUMENT.

The record filed in this court by the plaintiff in error shows that the case in the lower court was an ordinary action in ejectment, brought to try the title and right to possession of the defendant to a lot in the City of Fort Scott, Kansas. That the plaintiff held the original title and the defendant held title and possession under a tax-title deed the lot having been sold for taxes under the laws of Kansas. The lower court held the tax deed void, and gave judgment for the plaintiff. The defendant then carried the case to the Supreme Court of Kansas, where the judgment was reversed,—Sanger vs. Rice, 43 Kan., 580,—and the case remanded to the lower court for further proceedings. This decision of the state Supreme Court is the one which the plaintiff in error now seeks to review in this proceeding.

The case was decided in the Supreme Court of Kansas in April, 1890, and the additional record of the further proceedings in the state court below, attached to defendant's motion to dismiss, shows that at the next term, on June 2d, 1890, the mandate of the Supreme Court was spread upon the journal, the judgment in favor of the plaintiff set aside and the case again tried, resulting in a judgment for the defendant.

Upon this state of facts it is respectfully submitted that this case should be dismissed at once and this motion granted.

1. Because no federal question is involved, it being a mere contest between two parties, each claiming title to the property in dispute. No question was made by the defendant as to the fact that the plaintiff was the holder of the original title, and was entitled to recover unless it was held that the defendant's tax deed was valid upon its face, the defendant having held possession under it for more than five years, the statutory limit as to tax deeds, and upon this theory both sides tried the case. The lower court held the deed void, while the Supreme Court held it valid. In so deciding those courts simply construed a state statute and decided whether the statutes had been complied with in the form of the tax deed, since under the laws of Kansas, Sec. 141, p. 967, C. L. 1879, no suit can be maintained against a tax purchaser after five years, "except in cases where the taxes have been paid or the land redeemed." The points decided then, were that the five years statute had run, and that the form of the deed complied with the law, no attempt having been made to establish either that the taxes had been paid or the land redeemed.

2. But as the plaintiff voluntarily went into the District Court of Bourbon County, Kansas, after this decision of the

state Supreme Court, and tried his case over again, he is estopped from attempting in this proceeding to attack that decision. If he desired to review the decision of the Supreme Court of Kansas, it would seem that properly he should have applied for a stay of proceedings in the state courts pending the proceedings in the Supreme Court of the United States. This course, however, was not pursued, but on the other hand the plaintiff submitted to a new trial, which resulted in favor of the defendant. This ended the case in the state courts, as the record shows that no further proceedings were had or action taken there. This was on June 2d, 1890, while the citation from this court was not served until March 27th, 1891, several months afterwards.

Of course it goes without saying that had the plaintiff in error been again successful at the trial of June 2d, 1890, he would quietly have rested upon that decision, and would not now be prosecuting this proceeding; but in any event his only course was to have carried the case again to the Supreme Court of the state, and then, if need be, to this court, or else have obtained a stay of proceedings, as above indicated, and having failed to pursue either course he has lost his right to prosecute the present case and it should be dismissed.

J. D. McCLEVERTY,

Atty. for Deft. in Error.

Fort Scott, Kansas, Sept. 30th, 1891.